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In the Supreme Court
of the
United States

OCTOBER TERM, 1938.

No. 342

FRANK O. LOWDEN, JAMES E. GORMAN AND JOSEPH B. FLEMING, TRUSTEES, CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY, A CORPORATION, PETITIONERS,

VS.

SIMONDS-SHIELDS-LONSDALE GRAIN COMPANY, A CORPORATION, RESPONDENT.

BRIEF OF PETITIONERS.

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VS.

SIMONDS-SHIELDS-LONSDALE GRAIN COMPANY, A CORPORATION, RESPONDENT.

BRIEF OF PETITIONERS.

I.

OPINIONS OF COURT BELOW.

The opinions (R. 89, 100) of the Circuit Court of Appeals are reported, *Lowden et al.* v. *Simonds-Shields-Lonsdale Grain Co.*, 97 Fed. (2d) 816. The opinion of the District Court (R. 86) is reported, *Lowden et al.* v. *Simonds-Shields-Lonsdale Grain Co.*, 19 Fed. Supp. 438.

II.

GROUNDS ON WHICH JURISDICTION OF THIS COURT IS INVOKED.

a. Statutory Provisions Believed to Sustain the Jurisdiction.

The jurisdiction of this court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925, c. 229, Section 1, 43 Stat. 938 (28 U. S. C. A., Section 347 (a), page 359), and under the same Act, c. 229, Section 8, 43 Stat. 940 (28 U. S. C. A. Section 350, page 376). The case originated in the United States District Court under the Acts of March 3, 1911, c. 231, Section 24, par. 8, 36 Stat. 1092 and October 22, 1913, p. 32, 38 Stat. 219 (28 U. S. C. A., Section 41 (8), p. 594), as a suit arising under the Interstate Commerce Act, more particularly referred to hereinafter and quoted in the Appendix, post.

b. The Date of the Judgment to be Reviewed.

The judgment of the Circuit Court of Appeals affirming the judgment of the District Court was entered July 7, 1938 (R. 100) and appellants' petition for rehearing (R. 101) was denied and the judgment by the Circuit Court of Appeals became final August 4, 1938 (R. 105). Petitioners' petition for certiorari and supporting transcript of record were filed in this court on September 12, 1938, and the petition was granted on October 17, 1938 (R. 106).

c. Nature of the Case and of the Rulings of the Circuit Court of Appeals Relied Upon as Basis of This Court's Jurisdiction.

The case was an action (R. 2-25) by plaintiff carrier to recover the charges provided by the freight tariff on file with the Interstate Commerce Commission for service rendered for the shipper of installing grain doors in box cars for interstate shipment of bulk grain by the shipper under a tariff provision (R. 39, 50A) providing that grain doors "shall be installed by the shipper (or his agent) and at his expense. The railroad will act as shipper's agent and install grain doors at terminal elevator points specified below at a charge of one dollar ($1.00) per car; prior arrangements for the service to be made with the carriers and to cover a specified period of time; * * * Kansas City . . . Mo.-Kan."

The Circuit Court of Appeals by its majority opinion (R. 89) held that a letter from the shipper to the carrier (R. 40-2, 43) directing the carrier to install grain doors from and after July 1, 1935, but also stating that the shipper would not pay the tariff charge therefor, did not constitute a prior arrangement within the meaning of the tariff; that a prior arrangement was a condition precedent to liability by the shipper, and that the shipper was not liable for the charge, although following the letter the doors were installed by plaintiff carrier, and the cars thereafter accepted, loaded, and shipped in interstate commerce by the shipper (R. 43). The majority of the court (R. 89) refused to hold, as was held by Judge Woodrough in a dissenting opinion (R. 100), that the only arrangement required by the tariff was for the shipper to let the railroad know "before shipment which

one as between the two of them is to perform the service in question and for how long"; and that the shipper "unequivocally indicated" its expectation that the railroad would perform the service and fixed the time 'from and after June 1, 1935'" that the "accompanying threat not to pay for the service was brutum fulmen—as though they had said they would not pay the freight on the goods they had shipped;" that discrimination would be avoided by requiring the shipper to pay.

d. Cases Believed to Sustain the Jurisdiction of This Court.

Menasha Paper Co. v. *Chicago & Northwestern Ry.*, 241 U. S. 55, 59-60, 36 S. Ct. 501, 503-4.

Pittsburgh, etc. R. R. Co. v. *Fink*, 250 U. S. 577, 581-3, 40 S. Ct. 27, 28.

N. Y. C. R. v. *York, etc. Co.*, 256 U. S. 406, 408, 41 S. Ct. 509, 510.

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Wabash R. R. Co. v. *Horn*, 40 Fed. (2d) 905, 906 (C. C. A. 7).

III.

STATEMENT OF THE CASE.

The involved action was brought in the District Court of the United States for the Western District of Missouri by petitioners, as trustees of the Chicago, Rock Island & Pacific Railway Company, against respondent, Simonds-Shields-Lonsdale Grain Company, to recover for services of the trustees in installing grain doors in box cars in which grain in bulk was shipped in interstate commerce by respondent (R. 2-25). For convenience, petitioners will be referred to as "plaintiff carrier" and respondent as the "shipper". Judgment was for the shipper in the District Court (R. 81) and on the appeal of plaintiff carrier (R. 31-37), the Circuit Court of Appeals for the Eighth Circuit affirmed the judgment of the District Court by a vote of two members (R. 89-100), with Judge Woodrough dissenting (R. 100). Petition for rehearing was denied August 4, 1938, (R. 105). The case was tried to the court upon formal waiver of a jury (R. 27-8, 38). The facts were largely stipulated, (R. 38-50A), and the District Court found the facts as stipulated, (R. 78).

Grain doors are wooden barriers placed inside of box car doors to prevent bulk grain loaded into the cars from leaking out of the doors, (R. 54-6, 72-4). Plaintiff carrier sued (R. 2-25) for the installation of grain doors at Kansas City, during the period of July 5, 1935 to February 29, 1936, in 624 box cars placed by plaintiff

carrier for loading at the shipper's elevator, loaded with bulk grain by the shipper and transported for it in interstate commerce, (R. 43, 48).

Prior to July 1, 1935, all carriers installed grain doors, at Kansas City and other terminal elevator points, in cars transported by them, without separate charge to the shippers for such installation, and there was no tariff provision for a charge by the carrier for such service (R. 56, 40). Effective July 1, 1935, a new tariff provision was added to the freight tariffs filed with the Interstate Commerce Commission which provided that the installation of grain doors should be a service performed by or at the expense of the shipper. The provision in question, identified as Item 70 of Western Trunk Lines Tariff, No. 330 (R. 39, 50A) reads as follows:

> "The grain doors or lumber so furnished shall be installed by the shipper (or his agent) and at his expense. The railroad will act as shipper's agent and install grain doors at terminal elevator points specified below, at a charge of one dollar ($1.00) per car; prior arrangements for the service to be made with the carrier and to cover a specified period of time: • • • Kansas City—Mo.—Kan." (R. 71)

In proceedings before the Interstate Commerce Commission attacking the provision, the Commission held the provision reasonable except for the amount of the charge, and that sixty cents (60c) per car instead of one dollar ($1.00) per car was and in the future would be a reasonable charge (R. 61, 65). (220 I. C. C. 753). Following the ruling of the Commission, and prior to the trial, plaintiff carrier reduced the amount sued

for from $1.00 per car to 60c per car, and by requested declaration of law at the trial sought judgment for such amount (R. 79). The tariff provision in question remained in effect throughout the period sued for (R. 39, 53, 51).

The shipper by its answer (1) attacked the tariff provision as unreasonable and (2) averred that it was not liable in any event because there had not been "prior arrangements for the service" within the meaning of the tariff provision (R. 26-7).

One day after the tariff provision became effective, on July 2, 1935, defendant shipper and other shippers wrote plaintiff carrier and other carriers that regardless of the tariff provision in question, the shippers expected the carriers "to continue from and after July 1, 1935, as before said date, to furnish and supply them upon orders for cars to load and ship bulk grain, such equipment for such purposes as is suitable safely to carry bulk grain", and that if ordinary box cars were furnished upon such orders, the shippers would "expect them to be fully coopered or prepared" with grain doors; that "regardless of the tariff items" the shippers declined and would decline to pay any charges whatsoever for the installation of grain doors in cars tendered for loading the bulk grain; that if the carriers did not install grain doors in such cars, the shippers would "demand reimbursement in full together with interest for each and every" expenditure for the installation of grain doors by the shipper (R. 40-2).

In reply to the shippers' letter of July 2, 1935, plaintiff carrier and the other carriers protested that

the installation by them of grain doors without the shippers paying the tariff charges would be a violation of law, and stated that unless "unqualified arrangements" were made it would be necessary to provide the cars which did not have grain doors installed. (R. 42-3) By further correspondence the shippers continued to demand that the carriers install grain doors and to declare that the carriers could not charge therefore, and the carriers continued to protest that the tariff required the shippers to pay the carriers for the service of installing grain doors when performed by the carrier at the request of the shipper (R. 42-48). Following the shipper's letter of July 2, 1935, and during the period of July 5, 1935, to February 29, 1936, plaintiff carrier in fact installed grain doors in the cars in question, and made demand upon the shipper for the payment of the charge provided by the tariff (R. 43-4). The shipper loaded and shipped the cars so equipped but refused to pay the charges demanded (R. 43-4, 45-8).

In both the District Court (R. 78-80) and in the Circuit Court of Appeals, (R. 97, 100) plaintiff carrier took the position the shipper was liable both because the shipper's letter of July 2, 1935, constituted "prior arrangements" for a definite period under the tariff, and because if there were not prior arrangements in strict compliance with the tariff, such arrangements were unnecessary or waived and the shipper liable for the charge by reason of the shipper's ordering the installation of the grain doors, the carrier's performing it and the shipper's accepting, loading and shipping of the cars with the installation so performed.

The District Court by memorandum opinion (R. 86-7) and the Circuit Court of Appeals for its majority opinion (R. 89-100) held that the shipper's request that the plaintiff carrier install the doors from and after July 1, 1935 accompanied by the shipper's statement that it would not pay for the service was not a prior arrangement within the meaning of the tariff, and that the making of a prior arrangement was a condition precedent to the accrual of the charge and could not be and was not waived by the shipper.

Differing with the majority opinion of the Circuit Court of Appeals, Judge Woodrough in his dissenting opinion held (R. 100):

> "The 'arrangement' required by the tariff is for the shipper to let the railroad know before shipment which one as between the two of them is to perform the service in question and for how long. Nothing else. These shippers unequivocally indicated their expectation that the railroad would perform the service and fixed the time 'from and after June 1, 1935'. Their accompanying threat not to pay for the service was brutum fulmen—as though they had said they would not pay the freight on the goods they shipped, or demurrage. If the courts require them to pay, discrimination between those who have had the service and have paid for it and those who have had it without paying for it will be avoided. Discrimination is the evil and the courts should help, not hinder, doing away with it."

IV.

SPECIFICATION OF ERRORS INTENDED TO BE URGED.

(1) The Circuit Court of Appeals erred in affirming (R. 100) the judgment of the District Court (R. 81) in favor of defendant shipper.

(2) The Circuit Court of Appeals erred in holding that the shipper's letter of July 2, 1935, demanding (R. 41) plaintiff carrier install grain doors from and after July 1, 1935, was not a prior arrangement within the meaning of the tariff and rendering the shipper liable for the tariff charges, although the shipper in the same letter stated that it would not pay the charges.

(3) The Circuit Court of Appeals erred in not holding that the shipper's request (R. 41, 43) for the installation of the grain doors, compliance therewith by the carrier and the shipper's acceptance, loading and shipping of the cars in interstate commerce, (R. 43, 44, 48) rendered the shipper liable for the tariff charges, regardless of whether there was a prior arrangement within the strict terms of the tariff provision.

ARGUMENT.

SUMMARY OF THE ARGUMENT.

POINT A.

The tariff made the installation of grain doors a service to be performed by or at the expense of the shipper in all cases, and by the carrier only as agent for the shipper and for a charge specified by the tariff and not included in the other transportation charges. The performance of the service by the carrier without charge would constitute unlawful discrimination.

Since the carrier could not lawfully agree to perform the service free of charge for the shipper, the same result cannot be accomplished by indirection.

POINT B.

The only prior arrangement required by the tariff was for the shipper to request or demand that the carrier install the grain doors as the agent of the shipper. The shipper's liability for and the amount of the charges was not the subject of the arrangement but was fixed by the tariff and therefor by law. There was a complete "prior arrangement" under the tariff.

POINT C.

The installation of grain doors by the carrier at the request of the shipper and the shipper's acceptance of the installations and loading and shipping of the cars in interstate commerce rendered the shipper liable for the tariff charges under the Interstate Commerce Act requiring uniform payment of all tariff charges and the prohibiting of discrimination, regardless of the manner and form of prior arrangement.

POINT D.

Jurisdictional grounds for review are presented and on the review the decision of the Circuit Court of Appeals should be reversed.

POINT E.

Respondent's position, as indicated by its brief opposing the petition for certiorari, is unsound.

POINT A.

The tariff made the installation of grain doors a service to be performed by or at the expense of the shipper in all cases, and by the carrier only as agent for the shipper and for a charge specified by the tariff and not included in the other transportation charges. The performance of the service by the carrier without charge would constitute unlawful discrimination.

Prior to July 1, 1935, the installation of grain doors at Kansas City and other terminal points had been a service performed by the carriers without separate charge to the shippers and for which the tariff provided no charge (R. 56, 40). The tariff provision in question which went into effect July 1, 1935, still required the carrier to furnish material for grain doors but made the service of installation a shipper's service, that is to say a service to be performed by the shipper itself or through an agent in all cases, and in all cases at the expense of the shipper (R. 39, 50A). Under the tariff the carrier was offered as an agent for the shipper for the purpose of installation of grain doors, and was to receive the payment of the charge therein specified of One Dollar ($1.00) per car. For convenience we repeat the quotation of the specific tariff provision:

"The grain doors or lumber so furnished shall be installed by the shipper (or his agent) and at his expense. The railroad will act as shipper's agent and install grain doors at terminal elevator points specified below, at a charge of one dollar ($1.00) per car; prior arrangements for the service to be made with the carriers and to cover a specified period of time:

* * * Kansas City.....Mo.-Kan." (R. 50A).

The only circumstances under which the tariff permitted the carrier to perform the installation service were as the agent of the shipper and for the tariff compensation. The tariff, when it was on file, and as long as it was not disapproved by the Interstate Commerce Commission, had the effect of a statute. *Pennsylvania R. R. Co.* v. *International Coal Company*, 230 U. S. 184, 197, 33 S. Ct. 893, 896; *Robinson* v. *B. & O. Railroad Co.*, 222 U. S. 506, 509, 32 S. Ct. 114, 115.

In *Pennsylvania R. R. Company* v. *International Coal Mining Company*, *supra*, 230 U. S. 184, 197, 33 S. Ct. 893, 896, in an opinion by Mr. Justice Lamar, the Court said:

"The tariff, so long as it was of force, was, in this respect, to be treated as though it had been a statute, binding as such upon railroad and shipper alike. If, as a fact, the rates were unreasonable the shipper was nevertheless bound to pay and the carrier to retain what had been paid, leaving, however, to the former the right to apply to the Commission for reparation."

Prior to the trial of the case at bar the provision was expressly approved by the Interstate Commerce Commission as reasonable, except as to the amount of the charge, which was reduced from one dollar ($1.00)

per car to sixty cents (60c) per car. (R. 61, 65), 220 I. C. C. 753. Said Interstate Commerce Commission Report was in evidence (R. 51), and the finding and ruling was available to all shippers and carriers regardless of whether they were parties to the particular proceedings. *A. J. Phillips Co.* v. *Grand Trunk Western Railway*, 236 U. S. 662, 665, 35 S. Ct. 444, 445. Plaintiff carrier reduced the amount sued for from one dollar ($1.00) per car to sixty cents (60c) per car and sought judgment for the latter amount. (R. 79).

The Interstate Commerce Commission held "that when, at the request of the shipper, the carrier installs the grain doors it is entitled to a reasonable charge for the service rendered." (R. 61). The decision of the Circuit Court of Appeals is in conflict with this ruling of the Interstate Commerce Commission as well as with the decisions of this Court and the Circuit Court of Appeals relied upon by petitioners.

Since under the tariff (R. 50A) plaintiff carrier could perform the service of installation of grain doors only as the agent of the shipper, and at a specific charge in addition to the other freight charges, to permit the shipper to receive the benefit of the installation by the carrier without requiring the shipper to pay the charge, necessarily would be to permit unlawful discrimination under the Interstate Commerce Act which requires uniform payment of all tariff charges, 49 U. S. C. A. Sections 2, 6 (7), 10 (1) (2) (4), and prohibits preference or discrimination in any form or by any device, 49 U. S. C. A. Section 41 (1) quoted in Appendix Post. *Pittsburgh, etc. R. R. Co.* v. *Fink*, 250 U. S. 577, 581-3, 40 S.

Ct. 27, 28; *N. Y. C. R. Co.* v. *York, etc. Co.*, 256 U. S. 406, 408, 41 S. Ct. 509, 510; *Loomis* v. *Lehigh Valley, R. R. Co.*, 240 U. S. 43, 47, 50; 36 S. Ct. 228, 229-30; *Pennsylvania R. Co.* v. *International Coal Co.*, 230 U. S. 184, 197, 33 S. Ct. 893, 896; and *Robinson* v. *B. & O. R. R. Co.*, 222 U. S. 506, 509, 32 S. Ct. 114, 115; *American Railway Express Co.* v. *Lindenburg*, 260 U. S. 584, 589-90; 43 S. Ct. 206, 208-9.

In *Pittsburgh, etc. R. R. Co.* v. *Fink, supra*, 250 U. S. 577, 581-3; 40 S. Ct. 27, 28, in an opinion by Mr. Justice Day, the Court said:

> "The purpose of the Act to Regulate Interstate Commerce, frequently declared in the decisions of this court, was to provide one rate for all shipments of like character, and to make the only legal charge for the transportation of goods in interstate commerce the rate duly filed with the Commission. In this way discrimination is avoided, and all receive like treatment, which it is the main purpose of the act to secure.
>
> • • •
>
> "It was, therefore, unlawful for the carrier upon delivering the merchandise consigned to Fink to depart from the tariff rates filed. The statute made it unlawful for the carrier to receive compensation less than the sum fixed by the tariff rates duly filed. Fink, as well as the carrier, must be presumed to know the law, and to have understood that the rate charged could lawfully be only the one fixed by the tariff. When the carrier turned over the goods to Fink upon a mistaken understanding of the rate legally chargeable, both it and the consignee undoubtedly acted upon the belief that the charges collected were those authorized by law. Under such circumstances consistently with the provisions of the Interstate Commerce Act the consignee was only entitled to the merchandise when he paid for the

> transportation thereof the amount specified as required by the statute. * * *. The transaction, in the light of the act, amounted to an assumption on the part of Fink to pay the only legal rate the carrier had the right to charge or the consignee the right to pay. * * *.
>
> "* * * Nor can the defendant in error successfully invoke the principle of estoppel against the right to collect the legal rate. Estoppel could not become the means of successfully avoiding the requirement of the act as to equal rates, in violation of the provisions of the statute. * * *."

In *New York Central R. Co.* v. *York & Whitney Co.*, *supra*, 256 U. S. 406, 407-8, 41 S. Ct. 509, 510, this Court, speaking through Mr. Justice McReynolds, said:

> "The court below held that York & Whitney Company impliedly agreed to pay the rates imposed by law was a question of fact to be determined upon consideration of all the circumstances.
>
> * * *
>
> "We think the doctrine announced in *Pittsburgh, Cincinnati, Chicago & St. Louis Ry. Co.* v. *Fink*, 250 U. S. 577, (November 10, 1919), is controlling and that the liability of York & Whitney Company was a question of law. * * *."

If your petitioners in response to the shippers' letter of July 2, 1935 (R. 40-2), had agreed with the shippers to disregard the tariff and perform the service without charge, as demanded by the shippers in said letter, any such agreement would be null and void and the proper charge would nevertheless accrue under the foregoing decisions of this Court. Since the charge could not therefore be escaped directly by contract of the shippers with the railroads, it is submitted the shippers cannot escape the charge indirectly.

The control placed in the shipper to defeat the charge at will, which would result from the decision of the Circuit Court in this case, would establish a precedent for avoiding uniformity in tariff charges, invariably required in the foregoing decisions of this Court. Also see: *Merchants Warehouse Co.* v. *United States*, 283 U. S. 501, 511-12, 51 S. Ct. 505, l. c. 509; *Interstate Commerce Commission* v. *Baltimore & Ohio R. R. Co.*, 225 U. S. 326, 345, 32 S. Ct. 742, 748; *China Fire Ins. Co.* v. *Davis*, 50 Fed. (2d) 389, 390, 392, (C. C. A. 2); *Western Grain Co.* v. *Railway Co.*, 56 Fed. (2d) 160, 162, (C. C. A. 5); *Davis, Director General of Railroads* v. *Oil Co.*, 285 Fed. 470, 472-3, (C. C. A. 4).

The shipper's letter of July 2, 1935 (R. 40-2), demanding that the carrier install grain doors, in view of the tariff provision providing that the carrier would act as shipper's agent for that purpose, for a tariff charge, made it the duty of the carrier to install the grain doors. *Menasha Paper Co.* v. *Chicago & Northwestern Ry. Co.*, 241 U. S. 55, 59-60, 36 S. Ct. 501, 503-4, holding carrier bound to furnish cars to shipper on shipper's demand. When the carrier performed the service it performed a legal obligation and was in no sense a volunteer. The tariff (R. 50A) put upon the shipper the corresponding obligation to pay for the service so performed.

Doubtless if the carrier had installed the grain doors without any request from the shipper, the snipper would have been privileged to refuse the cars and the carrier would have been and remained a mere volunteer. Since in the case at bar, the shipper demanded that the carrier install the doors (R. '0-1), accepted the cars

after the installation, and loaded and shipped them in interstate commerce (R. 43, 48), the installation of the doors by the carrier can not be regarded other than a service by the carrier as agent of shipper under the tariff and for which the shipper is by law required to pay the tariff charges.

In *Loomis* v. *Lehigh Valley R. R. Co.*, 240 U. S. 43, 47, 50, 36 S. Ct. 228, 229-30, in an opinion by Mr. Justice McReynolds, it was held that in the absence of a tariff provision requiring the carrier to absorb the expense of grain door installation, the shipper could not perform the installation and sue in a state court to recover the expense thereof from the carrier. The attempt of the shipper in the case at bar to avoid payment of the installation performed by the carrier at the request of the shipper, (R. 41) under the tariff placing the expense of installation in all cases on the shipper, is an attempt by the shipper to violate the express provisions of the tariff and an even stronger case in favor of the carrier than the Loomis case.

POINT B.

The only prior arrangement required by the tariff was for the shipper to request or demand that the carrier install the grain doors as the agent of the shipper. The shipper's liability for and the amount of the charges was not the subject of the arrangement but was fixed by the tariff and therefor by law. There was a complete "prior arrangement" under the tariff.

Since the tariff (R. 50A) made installation of grain doors a service to be performed by and at the expense of the shipper in all cases and by the carrier only as agent of the shipper and for compensation provided by

the tariff (Point A, *supra*) the only arrangement to be made by the shipper with the carrier, under the tariff, to render the shipper liable for the tariff charges, was a request or demand by the shipper that the carrier act as his agent to install grain doors. The tariff, and therefore the law, fixed the obligation and amount of the charge and neither the obligation nor the amount was a matter for negotiation or arrangement by the shipper.

Pittsburgh, etc. R. R. Co. v. *Fink*, 250 U. S. 577, 581-3, 40 S. Ct. 27, 28; *N. Y. C. R. Co.* v. *York, etc. Co.*, 256 U. S. 406, 408, 41 S. Ct. 509, 510; *Loomis* v. *Lehigh Valley R. R. Co.*, 240 U. S. 43, 47, 50, 36 S. Ct. 228, 229-30; *Pennsylvania R. Co.* v. *International Coal Co.*, 230 U. S. 184, 197, 33 S. Ct. 893, 896; and *Robinson* v. *B. & O. R. R. Co.*, 222 U. S. 506, 509, 32 S. Ct. 114, 115.

Manifestly the letter of July 2 (R. 40-2, 43) whereby the shipper demanded that the carrier install the grain doors "from and after July 1, 1935", was a complete prior arrangement within the meaning of the tariff, rendering the shipper liable for the tariff charge for the grain door installations by the plaintiff carrier, following the letter and during the period of July 5, 1935, to February 29, 1936. Any other construction of the tariff or holding as to the sufficiency of the letter permits unlawful discrimination. The whole matter, both in reasoning and in result, was distinctly, ably and tersely stated by Judge Woodrough in his dissenting opinion, (R. 100):

> "The 'arrangement' required by the tariff is for the shipper to let the railroad know before shipment which one as between the two of them is to perform the service in question and for how long.

Nothing else. These shippers unequivocally indicated their expectation that the railroad would perform the service and fixed the time 'from and after June 1, 1935.' Their accompanying threat not to pay for the service was brutum fulmen—as though they had said they would not pay the freight on the goods they shipped, or demurrage. If the courts require them to pay, discrimination between those who have had the service and have paid for it and those who have had it without paying for it will be avoided. Discrimination is the evil and the courts should help, not hinder, doing away with it.''

POINT C.

The installation of grain doors by the carrier at the request of the shipper and the shipper's acceptance of the installations and loading and shipping of the cars in interstate commerce rendered the shipper liable for the tariff charges under the Interstate Commerce Act requiring uniform payment of all tariff charges and the prohibiting of discrimination, regardless of the manner and form of prior arrangement.

While it is believed that the case is properly disposed of on the ground that there was a complete prior arrangement within the meaning of the tariff, it is further submitted that regardless of that question, the requirement of the Interstate Commerce Act that all shippers alike pay interstate tariff charges on all services of and connected with interstate transportation, and the prohibition against discrimination in any form or any device, rendered the shipper liable as a matter of law for the tariff charges for the installation in question, upon the undisputed facts (R. 43, 41, 48) that the installation was requested by the shipper, was performed by the carrier, was accepted by the shipper, and the cars so equipped loaded and shipped in interstate commerce by the shipper.

The decisions of this court in *Pittsburgh, etc. R. R. Co.* v. *Fink,* 250 U. S. 577, 581-3, 40 S. Ct. 27, 28; *N. Y. C. R. Co.* v. *York, etc. Co.,* 256 U. S. 406, 408, 41 S. Ct. 509, 510, to the effect that a consignee accepting an interstate shipment becomes liable for all of the tariff charges, it is submitted, are authority for the proposition that the shipper is liable regardless of whether there was a prior arrangement within the technical meaning of the tariff.

No language of the tariff in question can be lawfully employed to defeat the collection of these tariff charges. Unlawful discriminations can not be clothed with immunity because the machinery for accomplishing such discriminations is in tariff form. *Merchants Warehouse Co.* v. *United States,* 283 U. S. 501, 511-12, 51 S. Ct. 505, l. c. 509, where this Court upheld an order of the Interstate Commerce Commission, which forbade the railroads from paying certain warehouses for services rendered by the warehouses in distributing and assembling package carload freight. This Court decided that such services were not transportation services and such payments amounted to rebates and that, in any case, such payments could not be granted to certain warehouses and refused to other warehouses since that would be an unlawful discrimination. This result was reached notwithstanding that there were published tariffs on file making those certain named warehouses part of the station facilities of the carriers.

This Court said, in the opinion written by Mr. Justice Stone, l. c. 511-12:

> "Where a forbidden discrimination is made, the mere fact that it has been long continued and that the machinery for making it is in tariff form, can not clothe it with immunity."

And further, pages 512-13:

> "The evil of discrimination was the principal thing aimed at by the Act. See *Louisville & Nashville R. Co.* v. *United States, supra,* page 749, and its language is certainly broad enough to embrace all discriminations of the sort described which it was within the power of Congress to condemn. Shreeveport Case, 234 U. S. 342, 356. Section 3 makes it unlawful for any rail carrier 'to make or give any undue or unlawful privilege or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic, in any respect whatsoever * * *'."

In *Interstate Commerce Commission* v. *Baltimore & Ohio R. R. Co.*, 225 U. S. 326, 345, 32 S. Ct. 742, 748, this Court refused to enjoin an order of the Commission requiring certain railway companies to cease charging lower rates for coal intended for railway consumption than the rates accorded to other shippers of coal. This result was reached notwithstanding the tariffs provided for such differences in rate. The opinion by Mr. Justice McKenna aptly stated the true nature of tariffs as follows, l. c. 345:

> "The Commission has ordered equality and struck down what it deemed to be preferential charges, even though they were made under formal tariffs. If there may be legal or illegal evasion of the order, we may wonder at the controversy. If the difference between the effect of the order and what the companies can do or want to do be, as is contended, a 'question of words'—a 'question of the nomenclature to be used in tariffs'—the order of the Commission may still be valid. Tariffs are but forms of words, and certainly the Commission, in the exercise of its powers to administer the Interstate Commerce Act, can look beyond the forms to what caused them and what they are intended to cause and do cause."

POINT D.

Jurisdictional grounds for review are presented, and on the review the judgment and decision of the Circuit Court of Appeals should be reversed.

It is believed that the question of whether the shipper may ask for and accept service by the carrier offered by the tariff, and by refusing to pay therefor escape liability for the charge fixed by the tariff for the service, is an important and precise question of Federal law which has not been but should be settled by this Court. (Petition, Ground 1, page 6.) It is believed that in holding that the shipper can so escape the charge, the Circuit Court of Appeals for the Eighth Circuit has rendered a decision in conflict with the decision of the Circuit Court of Appeals for the Seventh Circuit in *Wabash R. R. v. Horn*, 40 Fed. (2d) 905, 906, in which it was held that one who becomes the owner of a car in transit and by letter orders reconsignment of the car by carrier, could not prevent liability for freight charges by stating in the letter that all charges were to follow the car. (Petition, Ground 2, pages 6 and 7.)

It is believed that in holding that the letter demanding that the carrier perform the service (R. 40-2, 43) did not constitute a prior arrangement within the tariff and render the shipper liable, the Circuit Court of Appeals has decided a Federal question in a way probably in conflict with applicable decisions of this Court (Petition, Ground 3, pages 7 and 8); and in holding that the shipper is not liable for the service ordered, (R. 43) performed and accepted, (R. 43, 48) the Circuit Court of Appeals has decided a Federal question in a way probably

in conflict with applicable decisions of this Court (Petition, Ground 4, page 8), and regardless of whether there was a prior arrangement technically complying with the tariff provisions (Petition, Ground 5, pages 8 and 9).

It is respectfully submitted, upon Points A and B, *supra*, that the Circuit Court of Appeals erred in not holding that there was a prior arrangement for petitioners to act as respondent's agent, within the meaning of the tariff. It is respectfully submitted, upon Points A and C, *supra*, that the Circuit Court of Appeals further erred in not holding that regardless of the form and manner of prior arrangement, acceptance of the service performed by the carrier upon the demand of the shipper rendered the shipper liable for the tariff charges.

It is respectfully submitted that the Circuit Court of Appeals erred in not reversing the judgment of the District Court with directions to render judgment for petitioners for the amount sued for.

POINT E.

Respondent's position, as indicated by its brief opposing the petition for certiorari, is unsound.

"Prior Arrangements" Under the Tariff.

Respondent contends that there was no prior arrangement under the tariff because "respondent refused to make a prior arrangement", and that the trial court found that there was no prior arrangement and the Circuit Court of Appeals agreed with this finding.

The parties stipulated as to what respondent wrote and did (R. 38-50A, Opinion Circuit Court of Appeals,

R. 89-97), and the facts were undisputed. The construction of the tariff and the question of whether respondent made a prior arrangement for petitioners to install grain doors, within the meaning of the tariff, are questions of law. *Great Northern Ry. Co., et al.* v. *Merchants' Elevator Co.*, 259 U. S. 285, 291-2, 42 S. Ct. 477, 479-80. When respondent says that it refused to make a prior arrangement, we assume that respondent undertakes to interpret or construe the letter of July 2, 1935, which it sent to the carriers. (R. 40-2). The effect of that letter is a question of law for the court. This would be true even if respondent in this same letter in which it demanded that the carriers install the grain doors, had expressly stated that it was nevertheless refusing to enter into any prior arrangement under the tariff.

Respondent says there was no prior arrangement because it "insisted (presumably in the letter of July 2, 1935, (R. 40-2)) that it was the duty of the carrier to install grain doors as a part of its transportation service." When the tariff provision in question (R. 39, 50A) was promulgated, effective July 1, 1935, it ceased to be the duty of the carrier to install grain doors as a part of its transportation service (R. 56, 39), and the installation of grain doors became a service to be performed by or at the expense of the shipper in all cases (Point A, pages 12-18, *supra*). Respondent's insistence that it was the duty of the carrier to install the grain doors as a part of its transportation service, was directly contrary to the tariff and therefore to be disregarded (Points A and B, pages 12-20, *supra*). Respondent itself

says that a tariff "* * * has the force of law until changed in the proper manner", and this is of course true. *Pennsylvania R. R. Co.* v. *International Coal Co.*, 230 U. S. 184, 197, 33 S. Ct. 893, 896; *Robinson* v. *B. & O. R. R.*, 222 U. S. 506, 509, 32 S. Ct. 114, 115; *Great Northern Ry.* v. *Merchants' Elevator Co.*, 259 U. S. 285, 291-2, 42 S. Ct. 477, 479-80.

Respondent's contention that the arrangement did not "cover a specified period of time", is captious. The shipper's demand in their letter of July 2, 1935 (R. 40-2), that the carriers install grain doors "from and after July 1, 1935", manifestly satisfied the tariff requirement of arrangements "to cover a specified period of time" (R. 50A). Judge Woodrough in his dissenting opinion (R. 100) said: "These shippers unequivocally indicated their expectation that the railroad would perform the service and fixed the time 'from and after June 1, 1935.'" (July 1, was of course intended).

The further contention of respondent that it did not ask the carrier to act as its *agent* is also captious. It has been sufficiently pointed out that under the tariff the carrier could not lawfully install the grain doors except as the agent of the shipper and for the separate charge, over and above the transportation charges, fixed by the tariff in question.

Respondent's argument that tariff provisions must be complied with and its insistence that it is so held in *Davis* v. *Henderson*, 266 U. S. 92, are not pertinent to the question of whether, under the stipulated and undisputed facts, there was a prior arrangement, within the meaning of the tariff in question.

Respondent's assertion that "it is fundamental that tariff provisions are to be strictly construed and any ambiguous provisions are to be construed favorably to the shipper", is not supported by the decisions of this court cited by respondent.

On the contrary, this court in construing tariffs, favors neither the shipper nor the carrier. By the decisions of this court, tariffs are to be construed "favorably" to the uniform payment of all tariff charges by all shippers and the uniform service by all carriers to all shippers, and *unfavorably* to preference or discrimination in any form or by any device. (Point A, pages 12-18, *supra*).

There is no occasion to examine decisions of lower courts cited by respondent since a decision to the effect contended for by respondent, would be contrary to the rule of this court.

In *Great Northern Railway* v. *Delmar Co.*, 283 U. S. 686, 690-1, 51 S. Ct. 579, 581, a shipper contended that a tariff rate between two given points was to be applied to the long route as well as the short one. The tariff did not expressly restrict the rate to the shorter route (l. c. 688). Holding that such restriction was to be implied this Court said in an opinion by Mr. Justice Roberts, (l. c. 690):

> "In this situation we think the tariff should be construed as applying only to the shorter route, and not as giving the shipper the option between the two routes at the through rate. This conclusion is in accord with the principle that where two constructions of a written contract are possible, preference will be given to that which does not result in violation of law."

Liability of the Shipper Regardless of the Form and Manner of Prior Arrangement.

Respondent says "That it has been repeatedly held that a carrier cannot recover where the tariff has not been strictly complied with, even though the shipper is benefited." There is cited no decision of this court holding that a shipper, who has been benefited by receiving from the carrier a service *for which published tariffs require the shipper to pay the carrier*, can avoid paying the tariff charge. In *Chesapeake & Ohio R. R.* v. *Westinghouse*, 270 U. S. 260, cited by respondent, this court held that the carrier could not recover as for a special service rendered the shipper, because the tariff provided no charge for the service rendered and because in so far as the service was special and beyond that for which the tariff provided a charge, the carrier rendered an unlawful service, constituting a preference to the shipper. The tariff involved in the case at bar provided for installation of grain doors by the carrier, as the agent of the shipper, and imposed tariff charge therefor upon the shipper.

Respondent is not supported by *Davis* v. *Henderson*, 266 U. S. 92. In that case a shipper was denied recovery of damages for delay in delivering cars for loading and shipment of cattle, because his order had been oral and not in compliance with the tariff requirement that cars must be ordered in writing. To have permitted the shipper to recover would have been to have given him a preference or an advantage beyond that offered to shippers generally. Also, recovery was denied to the party who had failed to comply with the tariff, whereas

in the case at bar, the District Court and the Circuit Court of Appeals have held that the shipper could avoid payment of the tariff charges by reason of the shipper's own failure, as those courts have held, to make sufficient prior arrangement which, under the tariff, was necessary to entitle the shipper to the service.

Respondent relies heavily on *Van Dusen Harrington* v. *Northern Pacific Railway Co.*, 32 Fed. (2d) 466, decided by the Circuit Court of Appeals of the Eighth Circuit. If the case supports respondent, it is submitted that it is contrary to the rule of this court. The case, however, does not appear to be in point. The carrier was seeking to recover reconsignment charges for which the tariff provided, in case a given time elapsed before a reconsignment order, after notice by the carrier to the shipper of the location of the cars in which shipments were contained. Notice was, in the opinion of the court, imported to the shipper, as furnishing information, and a carrier's service upon which the charge was based. In the case at bar, the carrier performed the full service of the installation of the grain doors, and the service was accepted by the shipper, but shipper refused to pay for it.

If informality existed in the prior arrangements for the service, which is denied (Point B, pages 18-20, *supra*), it would be immaterial in view of the overriding concern of the Congress and this Court that no shipper receive a tariff service without paying the tariff charge therefor, and that there be no preference or discrimination in any form or in any device as between shippers. (Point A, pages 12-18, *supra*. Point B, pages

18-20, *supra*). In the case of *United States* v. *Miller*, 223 U. S. 599, cited by respondent, this court held, that a shipper was subject to indictment for violation of the law against rebates and discrimination, although the tariff rate in question had not been posted by carrier as required by Section 6 of the Interstate Commerc Act.

Conclusion.

It is, therefore, respectfully submitted that this case is one calling for the exercise by this Court of its supervisory power, and that this Court should reverse the judgment and decision of the Circuit Court of Appeals for the Eighth Circuit with directions that the Circuit Court of Appeals reverse the judgment of the District Court and direct that court to render judgment for petitioners for the amount sued for, as reduced at the trial to $374.40 by petitioners requested conclusion of law (R. 79) to conform to reduction of the tariff charge to 60 cents per car by the Interstate Commerce Commission (R. 65).

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APPENDIX.

Statutes Involved.

Section 2, 49 U. S. C. A. p. 137 (1920) (Transportation Act of Feb. 28, 1920, c. 91, §404, 41 Stat. 479).

Sec. 2. *Special rates and rebates prohibited.* If any common carrier subject to the provisions of this chapter shall, directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect, or receive from any person or persons a greater or less compensation for any service rendered, or to be rendered, in the transportation of passengers or property or the transmission of intelligence, subject to the provisions of this chapter, than it charges, demands, collects, or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation or transmission of a like kind of traffic or message under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is prohibited and declared to be unlawful. (Feb. 4, 1887, c. 104, Sec. 2, 24 Stat. 379; Feb. 28, 1920, c. 91, Sec. 404, 41 Stat. 479).

* * * * *

Section 6 (7), 49 U. S. C. A.—p. 283 (1920) (Transportation Act of Feb. 28, 1920, c. 91, §411, 41 Stat. 483.)

Sec. 6, par. (7) *Transportation without filing and publishing rates forbidden; rebates; privileges.* No carrier, unless otherwise provided by this chapter, shall engage or participate in the transportation of passengers or property, as defined in this chapter, unless the rates, fares, and charges upon which the same are transported by said carrier have been filed and published in accordance with the provisions of this chapter; nor shall any carrier charge or demand or collect or receive a greater or less or different compensation for such

transportation of passengers or property, or for any service in connection therewith, between the points named in such tariffs than the rates, fares, and charges which are specified in the tariff filed and in effect at the time; nor shall any carrier refund or remit in any manner or by any device any portion of the rates, fares, and charges so specified, nor extend to any shipper or person any privileges or facilities in the transportation of passengers or property, except such are are specified in such tariffs.

* * * * *

Section 41 (1), U. S. C. A., p. 308 (1906) (Elkins Act as amended by Hepburn Act of June 29, 1906, c. 3591, §2, 34 Stat. 587).

Section 41. *Liability of corporation carriers and agents; offenses and penalties.* (1) Liability of corporation common carriers; offenses; penalties; jurisdiction. Anything done or omitted to be done by a corporation common carrier, subject to the preceding chapter, which, if done or omitted to be done by any director or officer thereof, or any receiver, trustee, lessee, agent, or person acting for or employed by such corporation, would constitute a misdemeanor under said chapter or under Sections 41, 42, or 43, shall also be held to be a misdemeanor committed by such corporation, and upon conviction thereof it shall be subject to like penalties as are prescribed in said chapter or by Sections 41, 42, or 43, with reference to such persons, except as such penalties are herein changed. The willful failure upon the part of any carrier subject to said chapter to file and publish the tariffs or rates and charges as required by said chapter, or strictly to observe such tariffs until changed according to law, shall be a misdemeanor, and upon conviction thereof the corporation offending shall be subject to a fine of not less than $1,000 nor more than $20,000 for each offense; and it shall be unlawful for any person, persons, or corporation to offer, grant, or give, or to solicit, accept, or receive any rebate, concession, or discrimination in respect to the transportation of any property in interstate or foreign commerce by any common carrier subject to said chapter whereby

any such property shall by any device whatever be transported at a less rate than that named in the tariffs published and filed by such carrier, as is required by said chapter, or whereby any other advantage is given or discrimination is practiced. Every person or corporation, whether carrier or shipper, who shall, knowingly, offer, grant, or give, or solicit, accept, or receive any such rebates, concession, or discrimination shall be deemed guilty of a misdemeanor and on conviction thereof shall be punished by a fine of not less than $1,000 nor more than $20,000; Provided, That any person, or any officer or director of any corporation subject to the provisions of Sections 41, 42, or 43, or of the preceding chapter, or any receiver, trustee, lessee, agent, or person acting for or employed by any such corporation, who shall be convicted as aforesaid, shall, in addition to the fine herein provided for, be liable to imprisonment in the penitentiary for a term of not exceeding two years, or both such fine and imprisonment, in the discretion of the court. Every violation of this section shall be prosecuted in any court of the United States having jurisdiction of crimes within the district in which such violation was committed, or through which the transportation may have been conducted; and whenever the offense is begun in one jurisdiction and completed in another it may be dealt with, inquired of, tried, determined, and punished in either jurisdiction in the same manner as if the offense had been actually and wholly committed therein.

Section 10 (1), (2) and (4), 49 U. S. C. A., pp. 354-6 (Transportation Act of February 28, 1920, c. 91, Sec. 414, 41 Stat. 483).

(1) *Violation by carrier or officer; penalty.* Any common carrier subject to the provisions of this chapter, or, whenever such common carrier is a corporation, any director or officer thereof, or any receiver, trustee, lessee, agent, or person acting for or employed by such corporation, who, alone or with any other corporation, company, person, or party, shall willfully do or cause to be done, or shall willingly suffer or permit to be done,

any act, matter, or thing in this chapter prohibited or declared to be unlawful, or who shall aid or abet therein, or shall willfully omit or fail to do any act, matter or thing in this chapter required to be done, or shall cause or willingly suffer or permit any act, matter, or thing so directed or required by this chapter to be done not to be so done, or shall aid or abet any such omission or failure, or shall be guilty of any infraction of this chapter for which no penalty is otherwise provided, or who shall aid or abet therein, shall be deemed guilty of a misdemeanor, and shall, upon conviction thereof in any district court of the United States within the jurisdiction of which such offense was committed, be subject to a fine of not to exceed $5,000 for each offense; *Provided*, That if the offense for which any person shall be convicted as aforesaid shall be an unlawful discrimination in rates, fares, or charges for the transportation of passengers or property or the transmission of intelligence, such person shall, in addition to the fine hereinbefore provided for, be liable to imprisonment in the penitentiary for a term of not exceeding two years, or both such fine and imprisonment, in the discretion of the court.

(2) *False billing or classification by carrier; penalty.* Any common carrier subject to the provisions of this chapter, or whenever such common carrier is a corporation, any officer or agent thereof, or any person acting for or employed by such corporation, who, by means of false billing, false classification, false weighing, or false report of weight, or by any other device or means, shall knowingly and willfully assist, or shall willingly suffer or permit, any person or persons to obtain transportation for property at less than the regular rates then established and in force on the line of transportation of such common carrier, shall be deemed guilty of a misdemeanor, and shall, upon conviction thereof in any court of the United States of competent jurisdiction within the district in which such offense was committed, be subject to a fine of not exceeding $5,000, or imprisonment in the penitentiary for a term of not exceeding two years, or both, in the discretion of the court, for each offense.

(4) *Inducing unjust discrimination; penalty; liability for damages.* If any such person, or any officer or agent of any such corporation or company, shall, by payment of money or other thing of value, solicitation, or otherwise, induce or attempt to induce any common carrier subject to the provisions of this chapter, or any of its officers or agents, to discriminate unjustly in his, its, or their favor as against any other consignor or consignee in the transportation of property, or shall aid or abet any common carrier in any such unjust discrimination, such person or such officer or agent of such corporation or company shall be deemed guilty of a misdemeanor, and shall, upon conviction thereof in any court of the United States of competent jurisdiction within the district in which such offense was committed, be subject to a fine of not exceeding $5,000, or imprisonment in the penitentiary for a term of not exceeding two years, or both, in the discretion of the court, for each offense; and such person, corporation, or company shall also, together with said common carrier, be liable, jointly or severally, in an action to be brought by any consignor or consignee discriminated against in any court of the United States of competent jurisdiction for all damages caused by or resulting therefrom.